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The Bill of Rights and the States

WILLIAM J. BRENNAN, JR.

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William J. Brennan, Jr., is Associate Justice of the Supreme Court of the United States, to which he was appointed in 1956. After many years of private law practice following his graduation from Harvard Law School in 1931, he became a Superior Court judge in New Jersey in 1949, an Appellate Division judge in 1950, and a justice of the Supreme Court of New Jersey in 1952. "The Bill of Rights and the States" was the James Madison Lecture for 1961 at the New York University Law Center and is published by the Center with the permission of the "New York University Law Review," which printed the lecture in its April 1961 issue.

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John F. Wilson

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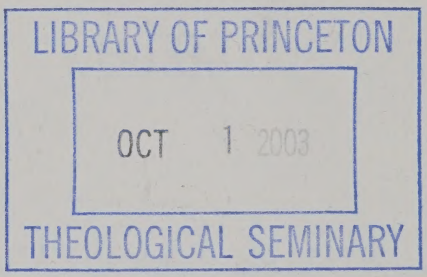

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THE BILL OF RIGHTS AND THE STATES

THESE REMARKS will discuss the application of the Bill of Rights to the states. The seeds of that controversial subject were sown before the nation was formed. When the Declaration of Independence severed the tie that bound the colonies to the Throne of England, each colony fell back upon its own inherent sovereignty, and the people of each, with the exceptions at first of Connecticut and Rhode Island, formed for themselves a Constitution, local, separate, and apart. Each state, formerly a colony, took fierce pride in its separate sovereignty. The states formed a Confederation, but so jealous was each of its sovereign prerogatives that too few powers essential to union were surrendered, and the enterprise foundered.

The Constitutions of the original states anticipated the national Constitution in declaring the doctrine that there are human liberties which are inalienable. This doctrine has ever since been the center and core of the American idea of limited government. The government of each state was the creation of the people of the state; the source of power was the people of that state. The only end and aim of government was to secure the people in their natural and civil rights. However, union under the Articles of Confederation, and later under the Constitution, was not effected by the people as a mass, but by the several peoples of the several states. In other words, the nation was created by the states and the people of the states, and not by the people separate from the states. The states remained possessed of every power of sovereignty which the several peoples of the several states had not delegated to the United States.

This feature was basic to both the Articles of Confederation and to the Constitution. A purpose of the Constitution was to improve upon the Articles of Confederation, and "to form a more perfect

union" of states. The Framers' aim was to grant the national government only such powers of sovereignty as were necessary to attain ends better secured by a national government than by the states individually or in confederation. Powers of sovereignty as they affected only a state and the people of the state were reserved to the state. "The powers reserved to the several States," said James Madison, "will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." [1]

In contrast, the national government might exercise only the powers enumerated in the Constitution, together with the power to make all laws necessary and proper for carrying into execution the enumerated powers. Even these limitations were not enough for the peoples of some of the states. So widespread was the fear that the national government might encroach upon the sovereignty of the states, and the sovereign rights of the peoples of the several states, that a number of states were reluctant to ratify the new Constitution without an express limitation on the authority of the national government to exercise certain powers. This was the genesis of the Bill of Rights.

It is natural then that the first ten Amendments should have been conceived only as a bulwark to the states, and the peoples of the states, against encroachments of the national government upon the sovereignty which the people of each state reserved to themselves and to their state government. Protection against encroachment on individual rights by a state government was a matter for the State Constitution. This division of sovereign powers between the states and the nation gave us, said John Quincy Adams, ". . . the most complicated government on the face of the globe." [2] The proper preservation of that division constituted from the beginning, and constitutes still, an important value in every consideration of the application of the federal Bill of Rights to the states. It is from this division that the concepts derive which we call

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All footnotes appear at the end.

"states' rights" or "the demands of our federalism." For ". . . it may not be unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." [3]

Yet there was support for the inclusion in the Constitution of restraints against encroachment by state governments upon rights of the peoples of the several states. Indeed, the Framers did include some restraints of this nature in the body of the Constitution itself. The prohibitions in Article I, Section 10, which forbid every state to pass any bill of attainder or *ex post facto* law or law impairing the obligation of contracts, are examples. Madison wanted more such restraints in the Constitution. He was by no means happy with the Bills of Rights which at that time were in the state Constitutions. Said he, ". . . some States have no bills of rights [four states had none], there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty." [4]

Madison proposed not ten but, in the form the House sent them to the Senate, seventeen Amendments. The House and Senate finally agreed on twelve to be submitted to the states. Only the last ten of the twelve were ratified to become the first ten Amendments. Among the proposals which the Senate rejected was No. XIV of the seventeen submitted by the House. No. XIV—a number prophetic of things to come seventy-nine years later—read: "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press." [5] Madison thought that these restrictions on state power were "of equal, if not greater importance than those already made" [6] in Article I, Section 10. There was, he said, "more danger of those powers being abused by the State Governments than by the Government of the United States." [7] Indeed, he "conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States

from infringing upon those essential rights, it was equally necessary that they should be secured against the State Governments." [8] It is only conjecture that Number XIV was defeated in the Senate by the votes of states whose systems of established churches would have been outlawed under this proposal. Some states (Massachusetts until 1833) maintained established churches long after the First Amendment became effective.

Plainly enough, however, Madison had no thought that any of the first eight Amendments which were adopted extended to the states. Yet as early as 1825 a textbook, the work of William Rawle, a Philadelphia lawyer, who had served as United States Attorney, argued that except for the First and Seventh Amendments the guarantees of the Bill of Rights "form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them. . . . A declaration of rights . . . equalizes all and binds all. It becomes part of the general compact. Each state is obliged, while it remains a member of the Union, to preserve the republican form of government in all its purity and all its strength. The people of each state, by the amended constitution, pledge themselves to each other for the sacred preservation of certain detailed principles, without which the republican form of government would be impure and weak." [9] Rawle's mistake was in conceiving that "We the people" in the Preamble meant that the Constitution was the creation of the American people compounded into one common mass; the Constitution was in fact the creation of states and of the people within each of the states.

Eight years later, in 1833, the Supreme Court made this clear in the first case, *Barron* v. *Baltimore*, which presented the question of the application of a provision of the Bill of Rights to a state. The City of Baltimore made street improvements which destroyed the commercial use of a wharf. The owner of the wharf sought damages from the City. The Maryland Court of Appeals held that he was not entitled to any. The wharf owner contended in the United States Supreme Court that the Maryland judgment violated the provision of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." That pro-

vision, the owner argued, "being in favour of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States."

Marshall thought the argument was "not of much difficulty." The Bill of Rights, he said, did not operate against state, but only federal, power. The federal Constitution, Marshall went on, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on powers, if expressed in general terms, are naturally and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." [10]

The Court reaffirmed this proposition in a number of cases decided over the next twenty-five years.[11]

EACH of the states in time adopted a Bill of Rights. Many of these followed the federal pattern. From all that appears, until the Civil War, they bore out Madison's prophecy that "if once bills of rights are established in all of the States as well as the Federal Constitution, we shall find, that, although some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency." [12]

It was after the Civil War that the demand arose for national protection against alleged abuses of state power. It was charged that the former Confederate states denied freedmen the protections for life, liberty, and property accorded the white man under

state Constitutions and laws. The constitutionality of remedial legislation passed by Congress was thought to be doubtful. This doubt led to the proposal for a constitutional amendment to remove any question of congressional power. This amendment became the Fourteenth Amendment.

Deep passions and extreme partisanship marked the controversy in and out of Congress over the adoption of the Fourteenth Amendment. It was the "Age of Hate in American politics." [13] The opponents' most powerful argument, repeated and repeated in the debates in Congress and up and down the land, was that the grant of powers under the Amendment would mean that the sovereign powers reserved to the states, the keystone of the structure erected by the Framers, would be transferred to the national government. "If the proposed amendments of the Constitution be adopted," said Senator Browning of Illinois, "new and enormous power will be claimed and exercised by Congress, as warranted by such amendments, and the whole structure of our Government will perhaps gradually but yet surely be revolutionized. And so with the Judiciary. If the proposed amendments be adopted, they may and certainly will be used substantially to annihilate the State judiciaries. . . . Be assured, if this new provision be engrafted in the Constitution, it will, in time, change the entire texture and structure of our Government, and sweep away all the guarantees of safety devised and provided by our patriotic sires of the revolution. . . ." [14]

This argument was not without force when directed to the first section of the Amendment as originally proposed. That proposal read: "Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each State all privileges and immunities of citizens in the several States; and to all persons in the several States equal protection in the rights of life, liberty and property." [15] This certainly sounded like an affirmative grant of power to the Congress to supersede state laws. This version, however, never got beyond committee. There was quickly substituted the language now in the first section of the Amendment: "No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That language, like the language of Article I, Section 10 of the Constitution, is language of limitation. On its face it appears simply to impose limits upon, and not to authorize Congress to displace, the states in the exercise of their traditional authority to legislate directly upon all their citizens in regard to life, liberty, and property. But Section 5 of the Amendment does grant the Congress affirmative authority to enforce these prohibitions by appropriate legislation. The substituted provision in no wise stilled the cries that the Amendment would effect a disruption of the historic distribution of sovereign powers and bring an end to the noble plan of the Framers. The opponents could not prevent the adoption of the Amendment. But it cannot be said that they were completely vanquished. For events were to prove that the Supreme Court would interpret the Amendment in a way which would go far to relieve their worry that its restraints effected the loss of separate and independent autonomy to the states.

The first case that came to the Court did not present the question of the application of a specific guarantee of the federal Bill of Rights to the states. It is an interesting conjecture whether state power would have been vindicated had such been the case. The first decision, known as the *Slaughter-House Cases*,[16] came down in 1872. Involved was the constitutionality of a Louisiana statute which put certain New Orleans butchers out of business by conferring on a single corporation a monopoly of the business of slaughtering cattle. The affected butchers claimed that they were denied one of the "privileges or immunities of citizens of the United States" protected from abridgment by the states under the Amendment.

There is much evidence that those who coined the phrase the "privileges or immunities of citizens of the United States" were not certain what privileges and immunities were covered by these words. The Court held by a 5-4 vote that whatever privileges or

immunities were included the privilege of following the butcher calling in the state of Louisiana was not one of them. The privilege of following that calling was a privilege not of United States citizenship but of state citizenship, and the prohibition of the calling by Louisiana was therefore inoffensive to the prohibition of the Fourteenth Amendment.

Nothing in the words themselves compelled that conclusion. Many still believe that the dissenting opinion in the *Slaughter-House Cases* expressed the sounder view. The Court was later to acknowledge that "Criticism of [the *Slaughter-House Cases*] . . . has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others."[17] But the prevailing opinion frankly disclosed the basic concern of the Justices who subscribed to it. To embrace, among "the privileges or immunities of citizens of the United States," the privilege of a Louisiana citizen to follow the butcher's trade, would be, the Court declared, "to transfer the security and protection of all the civil rights . . . to the Federal government[,] . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; . . . we are convinced that no such results were intended by the Congress . . . nor by the legislatures . . . which ratified" this Amendment.[18]

But what of the privileges and immunities declared in the federal Bill of Rights? Might not they be considered the logical referrent of "privileges or immunities of citizens of the United States," since they are expressly declared in the United

States Constitution itself? The Supreme Court was soon to reject that interpretation.

In case after case, beginning in 1875—each case presenting the question as to a different guarantee[19]—the Court held that the guarantees in the federal Bill of Rights were not among "the privileges or immunities of citizens of the United States." The process was completed in a series of cases decided from 1887 to 1908 in which the Court time after time rejected efforts to persuade it that the federal list of Rights in its entirety came within the protected privileges or immunities.[20]

I should complete here the story of the so-called "incorporation theory"—that is, the theory that the Fourteenth Amendment was intended to make all of the federal Bill of Rights applicable to the states. This view had the strong support of the first Justice Harlan, of Mr. Justice Brewer, and of Mr. Justice Field as early as 1892.[21] It was espoused in 1947 by Mr. Justice Black in his famous dissent in *Adamson* v. *California*.[22] Mr. Justice Black believes that in the earlier cases the Court fell into error in failing sufficiently to consult the history of the Fourteenth Amendment. He reads that history as demonstrating that the Framers of the Fourteenth Amendment intended to enfold the federal Bill of Rights within its commands.

"My study of the historical events that culminated in the Fourteenth Amendment," he said, "and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the States. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced."[23] Three other Justices shared this view with Mr. Justice Black in 1947,[24] but it has yet to command the support of a majority of the Court.

However, the rejection of the incorporation theory, and the disregard of the Privileges and Immunities Clause, have not closed

every door in the Fourteenth Amendment against the application of the federal Bill of Rights to the states. The Court has opened a door through the Fourteenth Amendment's Due Process Clause. During the last half century the Court has opened that door to admit some of the federal list. Moreover, the Court has indicated that the door may be opened to still more. True, it is often insisted that the application to the states of a safeguard embodied in the first eight Amendments is not made "because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." [25] In other words, the insistence is that the Due Process Clause is infused with "an independent potency" not resting upon the Bill of Rights.[26]

With all respect, I think that Mr. Justice Cardozo's analysis is more accurate. In 1937 he described what the Court has done as a process by which the guarantees "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a *process of absorption*. . . . [*T*]*he process of absorption* has had its source in the belief that neither liberty nor justice would exist if [those guarantees] . . . were sacrificed." [27] The criteria by which judgments have been made in the past as to which specifics should be absorbed, and which not, are neither precise nor definitive. The Court early said that "few phrases of the law are so elusive of exact apprehension as . . . [due process of law]. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise." [28]

The considerations of federalism of course loom large. A decision rejecting absorption of a particular guarantee will usually be made to rest on the inconsistency of its absorption with "the full power of the State to order its own affairs and govern its own people. . . ." [29] Where this consideration has been overborne, and the absorption of some specific has been decreed, the Court has said of that specific that it is "of the very essence of the scheme of

ordered liberty," [30] or that it is included among "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," [31] or that it is among those personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental." [32]

How many of the specifics of the Bill of Rights have been held to be absorbed by the Fourteenth Amendment? We start with the First Amendment.

By one or more of the tests all of the protections of the First Amendment have been held to extend to the exercise of state power. This development has taken place in a series of decisions handed down over the last thirty-five years. As recently as 1922, in *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 543, the Court had held that the Fourteenth Amendment did not make the protections of the First Amendment binding on the states. Since 1925, however, decisions have extended against state power the Amendment's protections for religion, speech, press, assembly, and petition.[33] Of freedom of thought and speech, said Mr. Justice Cardozo, "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." [34] Occasionally a member of the Court has suggested that the freedom of speech and of the press may be secured by the Fourteenth Amendment less broadly than it is secured by the First,[35] but this view has never persuaded even a substantial minority of the Court.

The First Amendment's protections for the cherished rights of mind and spirit thus stand guard against both state and federal governments. Voices are heard, however, which insist that these protections have not been as vigorously enforced against either federal or state power as they should be—that the judiciary, as to First Amendment rights particularly, have not justified Madison's faith that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights. . . ." [36] Last year my colleague, Mr. Justice Black, opened the James

Madison lectures at New York University with his distinguished paper on the subject whether the guarantees of the Bill of Rights, or at least most of them, are "absolutes" which strictly limit the exercise of congressional power, or are to be regarded merely as caution signals—"admonitions"—which Congress need not always observe.[37] Madison's unsuccessful effort to add a counterpart of the First Amendment to the Constitution, his Proposal XIV prohibiting the states from infringing the rights of conscience, and freedom of speech and press, strikingly evidences his concern for their fullest protection. For him, the suppression of individuality was the deadly enemy of the spirit, making a mockery of the dignity of man. Hence his warning that, because a representative government like ours expresses the majority will, "The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority." [38]

Besides the First Amendment guarantees, only three specifics of the federal list, as such, have so far been held to be absorbed by the Due Process Clause. Due Process applies to the states the Fifth Amendment's requirement that "just compensation" shall be paid for private property taken for public use.[39] Thus the Fourteenth Amendment imposes the requirement which Marshall held in *Barron* v. *Baltimore* that the federal Constitution did not originally impose upon the states. Due Process requires the states to appoint counsel for an accused charged with an offense punishable by death, in accordance with the Sixth Amendment's requirement that an accused shall have "the assistance of counsel for his defense." [40] Finally, Due Process applies to the states the Fourth Amendment's guarantees against unreasonable searches and seizures; after holding in 1914 that the Fourth Amendment was not directed against state officials,[41] the Court in 1949 held that "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such

enforceable against the states through the Due Process Clause."[42]

But considerations of federalism have thus far overborne the arguments in favor of the extension, as such, of the rest of the list. It may seem surprising that some of these should not be regarded as among "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." For example, the right to trial by jury, highly valued by most of us, has been said not to be fundamental. The Court has held that the Seventh Amendment's requirement of a common-law jury in civil causes does not apply to the states.[43] Many states try civil causes before juries of less than twelve and have abolished the common-law requirement of a unanimous verdict. Perhaps Madison would have agreed that a proper deference to states' rights justified this holding as to the Seventh Amendment. One doubts, however, that he would be as readily reconciled to the Court's dicta that the Sixth Amendment's guarantee to one accused of crime of the right to trial by a jury of his peers is not binding on the states. These dicta say not only that the Fourteenth Amendment does not absorb this guarantee but indeed that the Constitution does not prevent a state from abolishing trial by jury in criminal causes altogether.[44]

Madison's rejected Proposal XIV embodied protections against state power not only for conscience, speech, and press, but also provided that "no state shall infringe the right of trial by jury in criminal cases." The right of the accused to trial by jury was, said Madison, "as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[45] The Court's extension to the states of the First Amendment's protections accords with Madison's judgment that indeed neither liberty nor justice would exist if these guarantees were sacrificed. It remains to be seen whether his judgment will also be confirmed if the Court is ever faced with a case in which a state has abolished trial by jury for serious criminal offenses.

The Court has held that the Sixth Amendment's guarantee of the right of an accused to have the assistance of court-appointed counsel for his defense is not, in non-capital cases, a fundamental principle absorbed by the Fourteenth Amendment.[46] It is only

"[w]here the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . ." that the state has been held to have denied due process to a defendant tried for a non-capital offense.[47]

I have recorded my disagreement with this limitation of the extension of this specific of the Sixth Amendment to the states.[48] Rawle may have been in error in believing in 1825 that the Constitution without the Fourteenth Amendment imposed upon the states a duty to provide counsel in all state prosecutions. But none can deny Rawle's picture of the perilous position of the accused who must defend himself without a lawyer against the might of the state. "The most innocent man," Rawle said, "pressed by the awful solemnities of public accusation and trial, may be incapable of supporting his own cause. He may be utterly unfit to cross-examine the witnesses against him, to point out the contradictions or defects of their testimony, and to counteract it by properly introducing it and applying his own."[49] Without the help of a lawyer all the other safeguards of a fair trial may be empty.

And it is not the Due Process Clause that is alone involved here. The Equal Protection Clause of the Fourteenth Amendment is also implicated. For a state cannot, consistently with the federal Constitution, deny a citizen accused of crime the right to the assistance of counsel if he can afford to pay his own lawyer. The victims of the limitation upon the state's obligation to provide counsel are the indigent—they are the helpless, the weak, the outnumbered in our society. "The result of our decisions is to refuse a State the power to force a person into a criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. The need of counsel is the same, whatever the economic status of the accused. If due process requires that a rich man who wants a lawyer be allowed the opportunity to obtain

one before he is tried, why should not due process give the same protection to the accused who is indigent?" [50] A state may violate the Equal Protection Clause if the state fails at its expense to provide a convicted indigent defendant with a transcript of the trial proceedings for purposes of appeal.[51] The denial of counsel to an indigent accused seems almost to be an *a fortiori* case of the violation of the guarantee of equal protection of the laws.

The test of "fundamental unfairness" as a criterion applied to state prosecutions is not unique to cases involving the denial of counsel. For example, the values underlying the Fifth Amendment's privilege against self-incrimination are sufficiently absorbed by the Due Process Clause to invalidate a state conviction obtained with the aid of a confession, however true, which was secured from the accused by duress or coercion. The Court has said, "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." [52]

One may well ask why some of the safeguards for the just administration of criminal laws should be absorbed not at all, or only partially, in Due Process, when the protections of the First Amendment are absorbed in full. The Court has certainly recognized the paramount importance of procedural safeguards in criminal prosecutions. The Court has forged standards for federal prosecutions which go even beyond the demands of the federal Bill of Rights as presently construed.[53] True, these standards have been fashioned under the Court's inherent powers to supervise the administration of justice in the lower federal courts, while intervention in the administration of the criminal laws of the states implicates considerations of federalism. But federalism should not be raised to the plane of an absolute, nor the Bill of Rights be reduced to a precatory trust, and the Court within the last half-century has dealt increasingly with state administration of criminal justice in constitutional terms.[54]

The history of the Court's treatment of the application of the Fourth Amendment to the states is a good example. I have mentioned that in 1914 the Court held that the "Fourth Amendment is not directed to individual misconduct of [state] . . . officials; its limitations reach the Federal Government and its agencies." [55] But in 1949 the Court held that the Due Process Clause had absorbed the Fourth Amendment's protections. The 1914 decision had also held that evidence illegally seized by state officers might be received in a federal prosecution. Last Term the Court reconsidered this holding, now that the Fourth Amendment's protections are held to apply to the states, and held that evidence seized in violation of that Amendment, whether by federal or state officers, is not to be received in a federal prosecution.[56]

However, the 1949 decision left the states free to use in state courts evidence illegally obtained by state officers, if permitted under the state's rules of evidence. In other words, the exclusionary rule has not thus far been held to be a constitutional requirement woven into the Fourth Amendment's guarantees. Last Term's decision excluding the evidence in a federal prosecution was expressly grounded in the Court's inherent authority to supervise the administration of justice in federal courts and not on the Constitution.

Should the exclusionary rule be treated as a mere rule of evidence or does it take on constitutional mien in the context of the Fourth Amendment? There are members of the Court who insist that the rule must be treated as a constitutional requisite or the 1949 extension of the Fourth Amendment's protections to state power has been a meaningless exercise.[57] They point out that state officers have little incentive to obey the Fourth Amendment's commands if evidence seized in defiance of them may be used against the victims in state courts. Those who find it surprising that a state should be allowed to send a man to prison or to his death on evidence which state officials have obtained in disregard of the Constitution of the United States believe that inevitably the Court must reconsider its 1949 holding.

Fifty-four of the ninety-two Justices who have sat on the Court

have participated in decisions that have considered the application to the states of one or more of the federal list. For all of these Justices decision has involved choice among competing values. Some have claimed for Due Process that its special character, to use words Cardozo employed in another context, is "its power of adaptation, its suppleness, its play."[58] Federalism makes its own contribution to the preservation of our freedoms. The specifics of the Bill of Rights so far absorbed in Due Process have enhanced, not diminished, that contribution. The absorption of more can only further increase respect for our federalism. As Mr. Justice Schaefer of Illinois said in his Holmes Lecture at Harvard:

"Considerations of federalism of course remain important. But in the world today they must be measured against the competing demands arising out of the relation of the United States to the rest of the world. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law. That measurement is not taken merely in retrospect by social historians of the future. It is taken from day to day by the peoples of the world, and to them the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."[59]

THE COURT has other compelling reasons for the application to the states of more of the specifics of the Bill of Rights. The absence in our country of the turbulence witnessed in other lands cannot obscure the fact that crises at hand and in prospect are creating, and will create, more and more collisions between the citizen and his government. The need for vigilance to prevent government from whittling away the rights of the individual was never greater. Today as rarely before case after case comes to the Court which finds the individual battling to vindicate a claim under the Bill of Rights against the powers of government, federal and state.

The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. The safeguards en-

shrined in it are deeply etched in the foundations of America's freedoms. Among the important specifics of the Bill of Rights still not fully applied to the states are those which are pertinent to the standards which should govern the administration of criminal justice. Each is a protection with centuries of history behind it, often dearly bought with the blood and lives of people determined to prevent oppression by their rulers. Would Madison have thought that the right of a person not to be subjected for the same offense to be twice put in jeopardy of life or limb, not to be compelled in any criminal case to be a witness against one's self, that the accused in a criminal prosecution enjoys the right to a speedy and public trial by an impartial jury of twelve, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, were rights unnecessary to "the very essence of a scheme of ordered liberty," or that any was not among "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," or that any was not among those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"? In any event, what Due Process under the Fourteenth Amendment meant to the wisdom of other days cannot be its measure to the vision of our time. The importance of keeping aglow the fires of freedom was never greater. Excessive emphasis upon states' rights must not make the process of absorption "a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before" the Court.[60]

It is reason for deep satisfaction that many of the states effectively enforce the counterparts in state Constitutions of the specifics of the Bill of Rights. Indeed, some have been applied by states to an extent beyond that required of the national government by the corresponding federal guarantee.[61] But too many state practices fall far short. Far too many cases come from the states to the Supreme Court presenting dismal pictures of official

lawlessness, of illegal searches and seizures, illegal detentions attended by prolonged interrogation and coerced admissions of guilt, of the denial of counsel, and of downright brutality.[62] Judicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases will not serve to enhance Madison's priceless gift of "the great rights of mankind secured under this Constitution."[63] For these secure the only climate in which the law of freedom can exist.

FOOTNOTES

1. *Federalist* No. XLV (Heritage Press) p. 311.
2. Adams, *The Jubilee of the Constitution* 115 (1839).
3. *Texas* v. *White,* 7 Wall. 700, 725.
4. I *Annals of Congress* 439 (Gales & Seaton ed. 1834).
5. See Dumbauld, *The Bill of Rights* 215 (1957).
6. I *Annals* 440.
7. *Ibid.*
8. *Id.,* at 755.
9. Rawle, *A View of the Constitution of the United States of America* 120-121 (1825).
10. *Barron* v. *Baltimore,* 7 Pet. 243, 247.
11. See, *e. g., Lessee of Livingston* v. *Moore,* 7 Pet. 469, 551-552; *Permoli* v. *Municipality No. 1 of the City of New Orleans,* 3 How. 589, 609 (dictum); *Fox* v. *Ohio,* 5 How. 410, 434-435; *Smith* v. *Maryland,* 18 How. 71, 76; *Withers* v. *Buckley,* 20 How. 84, 89-91.
12. I *Annals* 436.
13. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding," 2 *Stanford Law Review* 5, 9 (1949).
14. Letter from Browning, *Cincinnati Commercial,* Oct. 26, 1866, p. 2, col. 4; Fairman, *op. cit. supra* note 13, at 78.

15. Fairman, *op. cit. supra* note 13, at 21.

16. 16 Wall. 36.

17. *Twining* v. *New Jersey,* 211 U. S. 78, 96.

18. *Slaughter-House Cases,* 16 Wall. 36, 77-78.

19. See *Walker* v. *Sauvinet,* 92 U. S. 90; *United States* v. *Cruikshank,* 92 U. S. 542, 552-556; *Hurtado* v. *California,* 110 U. S. 516; *Presser* v. *Illinois,* 116 U. S. 252, 263-268.

20. *In re Kemmler,* 136 U. S. 436, 448; *McElvaine* v. *Brush,* 142 U. S. 155; *O'Neil* v. *Vermont,* 144 U. S. 323, 332 (alternate holding); *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey,* 211 U. S. 78; and see *Spies* v. *Illinois,* 123 U. S. 131. See Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation," 2 *Stanford Law Review* 140 (1949).

21. *O'Neil* v. *Vermont, supra* at 337, 366.

22. 332 U. S. 46, 68; for contrasting views of the incorporation of the first eight Amendments by the Fourteenth Amendment, compare Flack, *The Adoption of the Fourteenth Amendment* (1908) with Fairman, *op. cit. supra* note 13.

23. *Adamson* v. *California,* 332 U. S., at 71-72 (dissenting opinion).

24. Mr. Justice Murphy stated that he and Mr. Justice Rutledge would go further. He said, 332 U. S., at 124, "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."

25. *Twining* v. *New Jersey,* 211 U. S., at 99.

26. *Adamson* v. *California,* 332 U. S., at 66 (concurring opinion).

27. *Palko* v. *Connecticut,* 302 U. S. 319, 326 (emphasis supplied).

28. *Twining* v. *New Jersey,* 211 U. S., at 99-100.

29. *Id.,* at 106.

30. *Palko* v. *Connecticut,* 302 U. S., at 325.

31. *Hurtado* v. *California,* 116 U. S., at 535.

32. *Snyder* v. *Massachusetts,* 291 U. S. 97, 105.

33. See *Gitlow* v. *New York,* 268 U. S. 652, 666; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624, 633; *Near* v. *Minnesota,* 283 U. S. 697, 707; *DeJonge* v. *Oregon,* 299 U. S. 353, 364; *Bridges* v. *California,* 314 U. S. 252, 277. See Dumbauld, *op. cit. supra* note 5, at 133–134.

34. *Palko* v. *Connecticut,* 302 U. S., at 327.

35. See *Beauharnais* v. *Illinois,* 343 U. S. 250, 288 (dissenting opinion); *Roth* v. *United States,* 354 U. S. 476, 505–506 (separate opinion); *Smith* v. *California,* 361 U. S. 147, 169 (separate opinion).

36. I *Annals* 439.

37. Black, "The Bill of Rights," 35 *New York University Law Review* 865 (1960).

38. I *Annals* 437.

39. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 241.

40. *Powell* v. *Alabama,* 287 U. S. 45, 68–69.

41. *Weeks* v. *United States,* 232 U. S. 383, 398.

42. *Wolf* v. *Colorado,* 338 U. S. 25, 27–28.

43. *Walker v. Sauvinet,* 92 U. S. 90.

44. *E. g., Palko* v. *Connecticut,* 302 U. S., at 324.

45. I *Annals* 437.

46. *Betts* v. *Brady,* 316 U. S. 455.

47. *McNeal* v. *Culver,*—U. S.—(decided January 23, 1961).

48. *Id.,* at—(concurring opinion).

49. Rawle, *op. cit. supra* note 9, at 127-128.

50. *McNeal* v. *Culver,*—U. S., at—(concurring opinion).

51. *Griffin* v. *Illinois,* 351 U. S. 12.

52. *Spano* v. *New York,* 360 U. S. 315, 320-321.

53. See, *e. g., McNabb* v. *United States,* 318 U. S. 332; *Mallory* v. *United States,* 354 U. S. 449; *Elkins* v. *United States,* 364 U. S. 206.

54. *E. g.,* mob domination of a trial in 1923, *Moore* v. *Dempsey,* 261 U. S. 86; the right to counsel in 1932, *Powell* v. *Alabama,* 287 U. S. 45; the effect of perjured testimony in 1935, *Mooney* v. *Holohan,* 294 U. S. 103, and see *Alcorta* v. *Texas,* 355 U. S. 28; coerced confessions in 1936, *Brown* v. *Mississippi,* 297 U. S. 278; double jeopardy in 1937, *Palko* v. *Connecticut,* 302 U. S. 319, and see *Hoag* v. *New Jersey,* 356 U. S. 464, and *Ciucci* v. *Illinois,* 356 U. S. 571.

55. *Weeks* v. *United States,* 232 U. S., at 398.

56. *Elkins* v. *United States,* 364 U. S. 206.

57. *Wolf* v. *Colorado,* 338 U. S., at 40, 41, 47 (dissenting opinions).

58. Cardozo, *The Nature of the Judicial Process* 84 (1921).

59. Schaefer, "Federalism and State Criminal Procedure," 70 *Harvard Law Review* 1, 26 (1956).

60. *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 275 (dissenting from the judgment of an equally divided Court).

61. See, *e. g., People* v. *Den Uyl,* 318 Mich. 645, 651, 29 N. W. 2d 284, 287, in which the Supreme Court of Michigan applied the state privilege against self-incrimination to exonerate from disclosure whenever there is a probability of prosecution in state or federal jurisdictions. "It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution." But see as to the federal privilege under the Fifth Amendment, *United States* v. *Murdock,* 284 U. S. 141.

    See also Vernon's Ann. Code Crim. Proc. of Texas, art. 494. "Whenever it is made known to the court at an arraignment or any other time that an accused charged with felony is too poor to employ a counsel, the court shall appoint one (1) or more practicing attorneys to defend him."

    And see proposed Arkansas H. B. 111 introduced January 17, 1961. The conviction or acquittal of an offense against the United States, under this bill, would constitute a bar to Arkansas prosecution for the same offense. Cf. *Bartkus* v. *Illinois,* 359 U. S. 121, which itself has been overruled by an Illinois statute, Ill. Ann. Stat. ch. 38, § 601.1, passed shortly after the Court's decision. This statute provides, "[w]henever on the trial of an accused person for the violation of any criminal law of this State it is shown that he has previously been tried and convicted or acquitted under the laws of the Federal government, which former trial was based on the act or omission for which he is being tried in this State, it is a sufficient defense. Laws 1959, p. 1893, § 1."

62. See Douglas, "Vagrancy and Arrest on Suspicion," 70 *Yale Law Journal* 1 (1960).

63. I *Annals* 432.

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